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Supreme Court, U.S.
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No. 01-1466

IN THE

Supreme Court of the United States

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

—v.—

PAULINE DAVIS; CYNTHIA WILLIAMS; CORNELIA SIMMONS; KIM RIVERA, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner, New York City Housing Authority ("NYCHA"), submits this reply brief in further support of its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit that affirmed in part and reversed in part the District Court's injunction against NYCHA's admission preference for working families ("WFP") at public housing developments more than 30% white ("Developments").

ARGUMENT

I.

THE SECOND CIRCUIT'S TRANSFORMATION OF THE DECREE INTO A DESEGREGATION PLAN VIOLATES THIS COURT'S PRECEDENT AND HAS ADVERSE RAMIFICATIONS FOR THE COURTS AND ALL LITIGANTS.

Contrary to plaintiffs' position, the fact that the *Davis* consent decree ("Decree"), like any other consent decree, contains certain unique terms is no reason to deny certiorari. *Cf.* Plaintiffs' Opposition Brief In Opposition to Petition for Writ of Certiorari ("Opposition Brief") at 12, 14-17. Indeed, there would be no need to have rules for interpreting consent decrees if they were all the same. Yet in *United States v. Armour & Co.*, 402 U.S. 673 (1971), this Court saw fit to enunciate the rule that a consent decree be interpreted according to its precise terms and not by reference to what one of the parties may have hoped to achieve had the case been fully litigated. Moreover, the Decree in this case is not atypical, but instead shares characteristics routinely used in consent decrees across the nation to resolve litigation, such as sunset clauses, obey-the-law provisions, and provisions affording remedial relief.

Although plaintiffs claim that the Second Circuit's decision does not conflict with a decision of this Court "on any important matter" (Opposition Brief at 12), the Second Circuit violated *Armour*'s four-corners rule as well as this Court's instructions that judicial supervision of local government operations should not operate in perpetuity (*Board of Educ. v. Dowell*, 498 U.S. 237, 237-38 (1991)) and that race-based remedies should be subjected to strict scrutiny (*Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989)). It did so by transforming the Decree, which provides remedial relief to individuals, prevents future discrimination, bars racial quotas, and expires after a specific period, into a desegregation plan with a specific racial quota that requires judicial supervision forever.

The Second Circuit's violation of this Court's precedent has ramifications well beyond this case, not only for NYCHA and other public housing authorities, but for the courts and all other litigants. Government entities and private litigants alike will be disinclined to resolve litigation without judicial intervention if their settlement agreements are subsequently recast by the courts to impose unanticipated and more onerous obligations.

A. The Decree Did Not Impose a Desegregation Plan By Its Terms Or By Incorporation of the Fair Housing Act.

Plaintiffs cannot point to a single provision in the Decree or the Tenant Selection and Assignment Plan ("TSAP") incorporated therein to support their current position that the Decree imposed a desegregation plan.[1]

[1] Although plaintiffs deny it now, in their submissions urging the District Court to approve the Decree a decade ago, the United States and plaintiffs acknowledged that the Decree was "not a direc-

Because there is no mention of "segregation" or any plan to desegregate in the Decree, plaintiffs ignore the terms of the Decree and rely on the Second Circuit's description of it. *Cf.* Opposition Brief at 17. While plaintiffs do quote from the TSAP, their quotation only highlights that the TSAP was not intended to *redress* past segregation but, "to *prevent* any unlawful discrimination on the basis of race, color, or national origin . . . ." (Opposition Brief at 18-19; 195a) Thus, both plaintiffs and the lower courts have impermissibly rewritten the Decree and the TSAP to transform NYCHA's obligation *not* to discriminate into an *affirmative* duty to desegregate.

Plaintiffs' explanation of why the TSAP's Borrowing Provision defines developments more than 30% white as segregated is demonstrably false. As NYCHA explained, if the parties had agreed that developments would be deemed segregated until their white populations fell below 30%, they would not have buried that agreement in a provision on Project Outreach in the back of the TSAP, which the Decree required to remain in effect for only five years. Plaintiffs counter that "[t]he 30-percent rule was not applied more broadly in the *original* plan [because the] *original* plan was adequate to accomplish its objective, so long as distortions were not introduced by Project Outreach." Opposition Brief at 22 (emphasis in original). Under plaintiffs' misguided notion, the objective was to eradicate past segregation, a goal which

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tion . . . 'to increase the number of minorities in public housing' " and that the remedial relief of setting aside apartments at the Developments would "correct for the effects of past discrimination." Petition at 8-9. In their Opposition Brief (at 21 n.9), plaintiffs now claim that "the parties agreed that such remedial relief *coupled with the original TSAP and the permanent injunctive provisions* would adequately redress past discrimination." (Emphasis in original). Plaintiffs offer no record citation for their current mischaracterization of the parties' agreement.

would not be reached until the Developments became less than 30% white. Yet there is no record evidence that any of the Developments would have become less than 30% white within the five-year life of the original TSAP. Indeed, even the lower courts found that, under the original TSAP, two of the 14 Developments would never become 30% white, three of them would not "be desegregated" for more than half a century, and another seven would not become 30% white until more than a decade after entry of the Decree. *Davis IX*, 278 F.3d 64, 87 (2d Cir. 2002) (45a-46a). Thus, plaintiffs' claim that the five-year original TSAP would meet what they now say was the parties' objective is incorrect.

The desegregation decisions on which plaintiffs rely only highlight that this case does not require the Developments to desegregate. For example, unlike the Decree here, the consent decree in *Sarabia v. Toledo Police Patrolman's Asso.*, 601 F.2d 914 (6th Cir. 1979), explicitly included a racial-mix goal and a limited timetable to reach it, and announced the achievement of the racial-mix goal as the explicit objective of the decree. *Id.* at 915. Similarly, unlike the Decree, the court-ordered plan in *Arthur v. Nyquist*, 712 F.2d 816, 817 (2d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), was "an elaborate remedy designed to achieve a goal of twenty-one percent minority teachers in all teaching areas through a race-conscious system for hiring and laying off teachers."

Finally, the Decree cannot be transformed into a desegregation plan simply because it refers to the Fair Housing Act. Plaintiffs argue that the Second Circuit properly found that the Developments were segregated and that the WFP would violate the Fair Housing Act by perpetuating segregation at 14 of them. Opposition Brief at 19-20, 25-30. Because this litigation was resolved

through the Decree without a trial or any finding of segregation or liability, however, the lower courts should not have made a finding now about whether the developments were segregated years ago. Instead, the Second Circuit should have relied exclusively on the Decree negotiated by the parties and approved by the District Court which contains no finding of segregation or requirement to desegregate. By going beyond the Decree to find past segregation based on assorted statistics, the Second Circuit violated *Armour*, which requires that "because the defendant has waived his right under the Due Process Clause to litigate the issues raised by entering into the decree, the conditions upon which he has given that waiver must be respected." *Armour*, 402 U.S. at 682.

B. The Second Circuit Transformed a Decree that Bars Racial Quotas Into a Decree that Imposes One.

Acknowledging that the Decree does not permit racial quotas, plaintiffs claim that the lower courts did not impose a racial quota but merely established 30% white as a yardstick of when developments are infected by past segregation. Opposition Brief at 23-25. This reasoning elevates form over substance. Regardless of whether it is referred to as a "quota" or a "yardstick," the practical effect of the 30%-white provision is to prevent NYCHA from implementing the WFP, or any other salutary change, until the Developments become less than 30% white. As Chief Judge Walker noted, "under the District Court's and the majority's holdings, the 30% figure . . . effectively becomes a quota which, should the NYCHA fail to meet it with sufficient dispatch, penalizes a housing project by denying to it the WFP." *Davis IX*, 278 F.3d at 89.

That the parties and the judge approving the Decree never intended to create the 30% quota subsequently fashioned by the lower courts is underscored by the fact that the judge approving the Decree did not apply strict scrutiny to the Borrowing Provision. As explained in NYCHA's petition, the quota fashioned by the lower courts from that provision would not have survived strict scrutiny because there was no finding of segregation that the State has a compelling interest to remedy. A 30% quota would also not be narrowly tailored because it applies to developments that were not included as Affected Developments where alleged discriminatory practices had occurred, as well as to senior developments whose applicant pool exceeds 35% white, and it ignores that white representation in the New York City-wide pool of individuals income-eligible for public housing exceeds 38%.[2] Moreover, certain of the Developments are not projected to ever become less than 30% white and others will take decades to reach that level. Thus, a requirement that they do so violates the well-settled rule that judicial supervision of local government operations should be temporary (*Dowell*, 498 U.S. at 237-38) and the Decree's explicit sunset clause whereby, with the exception of the permanent injunctive provisions, the Decree dissolved on July 1, 2001 (223a ¶ 50).

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[2] Plaintiffs dismiss the City-wide statistics as irrelevant and note that the relevant yardstick is white representation in the applicant pool. As the District Court properly found, however, implementation of the WFP would cause the percentages of White, African American, Puerto Rican, and "other" families receiving rentals to more closely match the applicant pool, while still underrepresenting whites. *Davis II*, 1997 U.S. Dist. LEXIS 10451, *12, 13, 21, 31 (S.D.N.Y. July 17, 1997) (146a, 152a, 158a). Thus, plaintiffs' reliance on the applicant pool hardly advances their position.

Plaintiffs do not dispute that a 30% quota was never subjected to strict scrutiny, but, as noted above, simply deny there is a quota, and claim that the argument was improperly raised for the first time in this Court. Opposition Brief at 25 n.11. Plaintiffs overlook that NYCHA has consistently argued that the Decree does not contain a finding of segregation, require the white population at the Developments to decline at all, much less to a particular percentage, or impose a desegregation plan. The absence of a strict-scrutiny analysis underscores the validity of NYCHA's position.

C. The Second Circuit's Transformation of the Decree Adversely Affects NYCHA, the Courts, and All Litigants.

Plaintiffs suggest that NYCHA has failed to show that the WFP is necessary at the enjoined Developments because those Developments have lower percentages of welfare recipients than NYCHA's system-wide average. Opposition Brief at 22. Plaintiffs ignore the District Court's finding that, "unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized" (*Davis II*, 1997 U.S. Dist. LEXIS 10451, *11 (145a)), and the Second Circuit's concurrence that "it is undisputed that unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized." *Davis V*, 166 F.3d 432, 434 (2d Cir. 1999) (113a). Plaintiffs also ignore that the harm to the Developments cannot be measured by a snapshot of welfare statistics at any given point in time. Instead, the harm stems from an injunction against the WFP, barring the admission of working families into the Developments for years or decades into the future, if not permanently. Thus, the Developments will be deprived indefinitely of

the role models and economic and social stability working families provide, as their new admissions are limited to those families with the most serious social problems, like the homeless, victims of domestic violence, and intimidated witnesses of crimes.

Moreover, as Chief Judge Walker noted, federal law vests maximum authority, discretion, and control in NYCHA and other public housing authorities that perform well. The bar against the WFP unjustifiably infringes on that discretion. *See Davis IX*, 278 F.3d at 88-89 (47-49a).

The ramifications of the Second Circuit's decision extend well beyond NYCHA and other public housing authorities. If a settlement agreement can be recast as the lower courts have done here, government entities and private litigants alike will have no incentive to amicably resolve litigation by acknowledging that past actions, no matter how well-intentioned, had adverse effects and by providing a remedy. The Courts will be burdened with deciding all issues, and the national policy in favor of settlements frustrated. *See, e.g, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980).

II.

THIS COURT SHOULD REVIEW WHETHER, AS A MATTER OF LAW, A SALUTARY GOVERNMENT POLICY CAN BE PERMANENTLY ENJOINED BASED ON STATISTICS THAT ARE NOT STATISTICALLY SIGNIFICANT.

Plaintiffs distort the statistical issue raised by NYCHA. *Cf.* Opposition Brief at 17-18. NYCHA is not asking this Court to rule on which expert's assumptions to credit in this case. The issue NYCHA raises is whether a government agency may be prohibited from implementing an indisputably salutary policy endorsed by the federal government, based on statistical evidence that lacks statistical significance. The parties and the District Court all agreed that any disparities between the TSAP and the WFP could not be considered meaningful unless those disparities were, as a preliminary matter, statistically significant. *Davis VI*, 60 F. Supp. 2d 220, 240 (S.D.N.Y. 1999) (107a). Apparently agreeing with NYCHA that the differences between the two systems are not statistically significant, the Second Circuit dispensed with the need to show statistical significance.

Statistical significance measures whether a particular phenomenon is the cause of a specific set of effects. *See Ottaviani v. State University of New York*, 875 F.2d 365, 371 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Plaintiffs' Opposition Brief only highlights that there are several possible causes for any disparities between white representation under the TSAP and the WFP. Plaintiffs themselves attribute those disparities, not just to the

"boosting" [3] of the white admission rate under the WFP, but also to the approval by the United States Department of Housing and Urban Development of limited project choice, the tendency of white families to cluster in predominantly white developments, and the racial and economic demographics of NYCHA's waiting list. Opposition Brief at 6, 14-16. Where, as here, plaintiffs themselves have identified alternative causes for the differences in white representation under the TSAP and the WFP, it is all the more essential for plaintiffs to demonstrate that the differences between the two systems are statistically significant and not caused by chance.

CONCLUSION

Based on the foregoing and NYCHA's petition, a writ of certiorari should be granted.

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[3] Plaintiffs misleadingly refer to the "additional" white families who would occupy the Developments under the WFP. Opposition Brief at 30. Under the WFP as well as the TSAP, however, the number of white families living in each of the Developments, except Middletown Plaza, will continue to decline; not a single additional white family will be added. *Davis IX*, 278 F.3d at 73 (17-18a).